England has given Egypt mixed courts, with appropriate codes. This is the second stage, the first being that of military justice.

In Eretria, the Italian law governs Italians (assimilated) natives. For foreigners (unassimilated natives), foreign law, the Musselman code, the Fettia-Nagest and the Fettia-Mogareb, together with other traditions and customs control "in so far as is compatible with the spirit of Italian legislation and civilization." This is a further step towards the third stage, than is shown by Egypt. In this last or third stage, there is but one system and the racial differences have sunk to the grade of class distinctions. The colony is then a homogeneity, even if a heterogeneous one.

It is interesting to note a trace of the old Lombard laws, of Rotharis, Luitgold and Pepin, in the Eretrian law of today, for Article XII provides that in a suit between Italian subjects and others, "the Italian law shall prevail, when more favorable to either Italian citizen or foreigner."

Somali-land follows the same system, but has not reached the same stage of development. The native can renounce his law in order to take advantage of the Italian. Sentences can be imposed upon whole villages, thus recognizing the survival of collective punishment.

The Italian Code is applied in Libia, with modification, but this law does not show the existence of the third stage of colonial legislation, but marks the beginning of the second.

In conclusion, Alimena believes in individualized, even elastic penalties, *propter peccatum non re peccatur.* He disbelieves in the institution of capital punishments in lands where they have been unknown. He thinks that the system to be adopted is a gradual Italianization of local customs, and with especial regard to the criminal side of law, for it develops quicker than the civil. J. L.

Embezzlement and Loss of Franchise in Italy.—*Il Progresso del Diritto Criminale,* in the May and June number of the year 1914, contains two articles, the first entitled "Elettorato ed Elegibilita," and the second by Ubaldo Pergola—"I vecchi e i nuovi peculatori di fronte alla vigente legge elettorale politica."

The first reviews the decision of the Supreme Court holding that a man named Nasi, who had been found guilty and condemned under the code of 1895, could not be deprived of his right to vote under the provisions of the new law, which added the loss of franchise (temporary or permanent, as the case might be) to the other penalty for the crime.

Ubaldo Pergola takes up this decision in detail and finds nothing which can justify the decision of the court. It is thought that the court was influenced by popular feeling and the immediate justice of the case. So, criticizing the decision, Pergola takes up several interesting arguments, upon which the court relied, in coming to the decision which it handed down.

The question is the complicated one of inflicting the penalty under a new law for a crime committed under the old. Pergola would solve it simply, however, by basing his answer not on the retroactivity or non-retroactivity of the new statute, but by the ruling of the statute itself, which provides that condemnation for the crime of *peculato* shall not entail loss of franchise. In other words, he believes that not the act of embezzlement, but the fact of condemnation is the cause of the loss of the right. This is patently untenable, however; the act may be badly worded, but the act of continuation is used elliptically, in order to prepare the way for rehabilitation by pardon.

Pergola summarizes the decision of the Supreme Court as follows:

"(1) The chief and principal argument of the Supreme Court was implicitly taken from Article 2 of the Penal Code and may be outlined as follows:

"(a) The loss of the quality of elector and of eligibility for election is, in fact, a punishment.

"(b) But this penalty was not imposed by the political electoral law of 1895, under whose duration the crime was committed.

"(c) The new penalty imposed by Article 113, Section 7, of the new law, cannot therefore be applied.

"(2) The second and subordinate argument is based, on the other hand, on Article 2 of the former Civil Code and may be outlined as follows:

"(a) The quality of elector and of eligibility is an individual political right which belongs to citizens in their own right, revindicated by the revolutions, and is in no wise derived by legal grant. The statute itself merely recognizes a right which already belonged to the citizen.

"(b) It is, therefore, susceptive of perfect irrevocable acquisition as all private property rights.

"(c) The new law, which limits the exercise of the franchise, can be of no force in regard to existing electors, especially when it is not expressly retroactive."

Pergola takes up these propositions in detail and finds them all faulty. The franchise he does not believe to be a private right, but considers it a public duty and although men of the Eighteenth and Nineteenth Centuries, especially at the beginning of the French Revolution, because of the theories of the School of Natural Law and the atomistic theory of popular sovereignty, which looked upon suffrage as a quota of sovereignty, may have believed that the right to vote was a private right, still later and more scientific study has shown that it is only a public duty; otherwise every vote, and not the majority of votes, would have to have some weight. But even while it may be said that the philosophers, contemporary with the French Revolution, believed that the right to vote was a private right and while there are many statements to that effect, it still may be doubted whether they carried their theory to its legitimate conclusion. For example, they claimed that sovereignty belonged to the people, not to the individual.

Furthermore, if the franchise was a private right it could never be altered.

The article is replete with subtleties, but the *non-sequitur* seems to lie in the fact that even if the right to vote is not an individual and property right its loss can be considered a penalty; admitting that it is a penalty it, of course, cannot be retroactive, but this brings us to the second difficulty. If this is a provision of the criminal law and is, therefore, not retroactive, it cannot, of course, apply to the condemnation under the Act of 1895. This is not true, however, if it appears that it can follow the condemnation under the new law for a crime committed prior to its enactment upon any theory that it is a result of the condemnation and not a result of the crime. But this cannot seriously be considered in the face of the apparent intent of the act not to make the condemnation the cause of the disability, but merely to make the condemnation sufficient proof of the commission of the crime to entail the penalty.

There can be no doubt that the theory that the loss of a public duty and political rights can be a punishment, the theory upon which both the Supreme Court and the writer of a criticism of its decision based their argument, viz.: That the loss of the right to vote would not be a penalty unless it is a private

right, cannot be sustained. A man may be deprived of a public duty for the good of others (and this is the basis of electoral disabilities) or he may be punished by such a deprivation. This theory has been recognized in criminal law from the earliest times and is the basis of the so-called infamous punishments.

While the reasoning of the Supreme Court and of Pergola may not appeal to the majority of American readers the articles in *Il Progresso del Diritto Criminale* should, however, be read by all who are interested in the conflict of criminal with civil and public law. J. L.

Article 40 of the Italian Code.—Hon. Erico Romano di Falco, in *Il Progresso del Diritto Criminale* (Sept.-Oct., 1914), attacks Article 40 of the new Italian code of criminal procedure on the ground that its provision that no judge who has given sentence in a proceeding can participate in the same proceeding in its later stages. He claims that the wording of such a provision includes much more than it was intended to cover. It prevents a case being sent back to a judge by a court of appeals; it prevents a judge from continuing in a case from beginning to end, even while the case remains in his court.

The article, as we have said of so many written by Italian legal philosophers, shows on one hand a pettiness of which the Holy Trinity Church case shows the proper solution, but, on the other hand, it shows a law-abiding attitude which cannot be too strongly recommended. It must come if we are to be a great juridicial nature. The swing of the pendulum away from the pettifogging lawyer has gone too far. J. L.

Prof. Masucci on the Defense of an Absent Defendant.—Prof. Luigi Masucci has an article entitled *"La Lipesa dell'impulato nel judizio contumaciale"* in *Il Progresso del Diritto Criminale* (Sept.-Oct., 1914), in which he upholds the new Italian code of criminal procedure as far as it requires the appointment of an attorney for the absent defendant in criminal prosecutions. If the defendant in a criminal case, duly served, fails to appear it is the duty of the court to appoint a lawyer to defend the absentee. But this does not open the door to a defense on the merits and the admission of evidence for the defendant. For, while the absence of the defendant not only shows an attitude of disobedience to court, justifying a refusal of all consideration towards him, it is equivalent to a plea of "Guilty." And, while the interest of society in the proper conduct of punishment requires that every accused should be defended in his absence, it does not obligate or authorize the state, as his agent, to advance pleas for him. Prof. Masucci believes this to be practically right, but his theories of the underlying principles are different. He does not believe that proof of innocence should be admissible, because this would put a premium on absence, and the absence might well allow the proofs to acquire greater weight than they would have in the presence of the accused. Testimony as to physical ability, while not intentionally false, might lose all weight when the defendant stood in court. But he does believe that documentary evidence of innocence should be admissible because it could not be affected by the accused's presence.

This changes the basis of the rule. It does not seem to be so logical as to prohibit judgment by default, on the ground that criminal justice is a public function and that the interest of society is against the entry of criminal judgments by default. Neither does the distinction between parole and written evidence seem legitimate. Either a judgment upon the commonwealth's evidence should be allowed, or else the counsel for the defense should be allowed to offer evidence. If the present Italian system is followed the judge should cross-examine the